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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

THEOPLIS ROCKY SMITH,

Defendant and Appellant.

E055434

(Super.Ct.No. SWF1101002)

OPINION

APPEAL from the Superior Court of Riverside County. Dennis A. McConaghy,
Judge. Affirmed.

Jeanine G. Strong, under appointment by the Court of Appeal, for Defendant and
Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney
General, Julie L. Garland, Assistant Attorney General, Donald W. Ostertag and James
D. Dutton, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant guilty of misdemeanor domestic battery. (Pen. Code, § 243, subd. (e)(1).) The trial court granted defendant 36 months of summary probation with the condition he perform 60 hours of community service. The trial court ordered defendant to pay a booking fee in the amount of \$450.34. Defendant contends the trial court erred by imposing the booking fee without determining defendant's ability to pay the fee. We affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

The trial court sentenced defendant on December 9, 2011. Defendant, defense counsel, and the prosecutor agreed to a sentence. The agreement was memorialized on a two-page form titled "Sentencing Memorandum." The form reflects the following "Pay booking fees of \$414.45 or \$450.34 (GC § 29550)." The preprinted "\$414.45" on the form was crossed out by a pen, and \$450.34 was handwritten onto the form. The form also includes a sentence of 36 months summary probation with the condition defendant perform 60 hours of community service. Further, the form reflects defendant will have to pay a \$40 court security fee and a \$30 conviction assessment fee; however, the portion of the form requiring defendant to pay \$119.50 for attorney's fees is crossed out. The form is signed by defendant, defendant's trial counsel, and the trial judge. The prosecutor orally agreed to the sentencing terms on the form.

At the sentencing hearing, the following exchange occurred:

"The Court: Are you employed?"

"The Defendant: Getting ready to start looking for work right now."

“The Court: Find no present ability to reimburse the County for the court-appointed attorney fees. Good luck to you, sir.

“The Defendant: Thank you, your Honor.”

Defendant did not raise any objections during the sentencing hearing.

At trial, defendant testified he went to truck driving school and drove trucks with the victim from August to December 2003. Defendant further testified that he had a driver’s license and a car as of April 30, 2011. Additionally, on April 30, 2011, which was the date of incident at issue in this case, defendant purchased five pizzas for \$25 to feed 10 child relatives who were visiting him. Defendant had promised to take the victim to a restaurant that day, but decided to bring pizza to the house because he could not afford to take 10 children to a restaurant.

DISCUSSION

Defendant asserts the trial court erred by imposing a booking fee without first determining whether defendant had the ability to pay the fee. Defendant further contends this court should strike the booking fee based upon the trial court’s finding defendant did not have the ability to pay for his court-appointed attorney. The People contend (1) defendant forfeited this issue by failing to object at the trial court, (2) the trial court made an implied finding defendant had the ability to pay the booking fee, and (3) defendant’s ability to pay the fee is supported by substantial evidence.

Government Code section 29550, subdivision (d)(2), provides: “The court shall, as a condition of probation, order the convicted person, *based on his or her ability to pay*, to reimburse the county for the criminal justice administration fee, including applicable overhead costs.” (Italics added.)

We begin our examination with the forfeiture issue. In *People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1397 (*Pacheco*), the appellate court concluded the defendant did not forfeit the issue of whether the trial court erroneously imposed a booking fee by failing to first inquire into the defendant’s ability to pay the fee. The appellate court reasoned the issue was one of substantial evidence, and that “such claims do not require [an] assertion in the court below to be preserved on appeal. [Citations.]” (*Ibid.*)

The issue of whether a defendant can forfeit a claim that he is unable to pay his booking fee is pending review by our Supreme Court in *People v. McCullough*, review granted June 29, 2011, S192513. For the sake of judicial efficiency, we will assume defendant in the instant case has not forfeited the issue for appeal by failing to object in the trial court.

We now turn to the merits of defendant’s contention. “The court’s finding of the defendant’s present ability to pay need not be express, but may be implied through the content and conduct of the hearings. [Citation.] But any finding of ability to pay must be supported by substantial evidence. [Citations.]” (*Pacheco, supra*, 187 Cal.App.4th at pp. 1398, 1400.)

Defendant asserts the trial court made an implied finding he did not have the ability to pay the booking fee. The People assert the trial court made an implied finding defendant did have the ability to pay the booking fee. We see evidence supporting both viewpoints. In support of defendant's position, the trial court struck the requirement for defendant to pay attorney's fees, which were approximately \$300 less than the booking fee, based upon a finding defendant did not have the ability to pay the \$119.50 fee. Additionally, the evidence reflects defendant was unemployed.

Supporting the People's position is (1) the signed sentencing memorandum reflecting a booking fee of \$450.34, signed by defendant, defense counsel, and the trial judge; (2) defendant's statements about being a trained truck driver; (3) defendant's testimony that he has a driver's license; (4) defendant's statement that he would be looking for work; and (5) defendant's testimony that he spent \$25 on pizza for relatives.

The fact that the trial court signed the sentencing memorandum, which reflects the booking fee, indicates an implied finding that defendant had the ability to pay the booking fee. This implied finding is further supported by the actual imposition of the booking fee. Thus, we find greater support for the People's argument that the trial court impliedly found defendant has the ability to pay the booking fee.

Moreover, as set forth *ante*, such a decision is supported by the record, because defendant agreed to the fee, was looking for work, had a car, had a driver's license, and earlier in the year had money to purchase dinner for relatives. Thus, there is evidence supporting the implied finding that defendant had the ability to pay the booking fee.

Since there is substantial evidence supporting the implied finding, we conclude the judgment must be affirmed.

DISPOSITION

The judgment is affirmed.

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MILLER
J.

We concur:

RAMIREZ
P. J.

McKINSTER
J.